KHOO YOKE WAH & ORS.

v.

LEE CHOO YAM HOLDINGS SDN. BHD. & ORS.

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
HARUN HASHIM SCJ
GUNN CHIT TUAN SCJ
[SC CIVIL APPEAL NO. 02-93 OF 1990]
17 JANUARY 1991

PARTNERSHIP: *Partnership in existence since 1958 - Various changes to date - Whether partnership dissolved by death of two partners - Provisions of statute - Contrary intention - Conduct of parties - Applicability of Indian and/or English authorities - Partnership Act 1961, s. 35(1).*

The appellants, the respondents and one E were partners of TK goldsmiths and jewellers which was formed on 15 September 1958 with 18 partners. L who was the most senior partner managing the business died in August 1988 and another partner N died in April 1988. From 1958 to L's death, there had been various changes in the constitution of the partnership and it was never suggested that any of these changes resulted in the dissolution of the original partnership; however when L died and his widow wanted to step into his shoes in the partnership, the respondents opposed, contending that the death had dissolved the partnership and filed an order for a declaration that the partnership was dissolved under s. 35(1) of the Partnership Act 1961 (the Act) for an appointment of a receiver for dissolution of the business.

The trial Judge had held that under s. 35(1) of the Act, there must be cogent proof of an agreement made between the parties at the time they first entered into the partnership which should have been made prior to the death of the partner. The appellant appealed on the basis that the Judge was wrong in law, contending that the true principle is that a contrary intention may be deduced from the conduct of the surviving partners and heirs of the deceased partner.

The issue for the Court was whether there was evidence of any agreement that the partnership was not dissolved by the deaths of L and N.

Held:

[1] Indian cases concerning the construction of the repealed s. 253(10) of the Indian Contract Act 1872, would have been useful and persuasive authorities for construing the repealed s. 206(j) of the Contracts (Malay States) Ordinance 1950, prior to 1 July 1974.

[2] (a) Since the coming into force of our Partnership Act 1961, for the whole of Malaysia on that date, Indian cases on the construction of the repealed s. 253(10) of the Indian Contract Act 1872, or the following s. 42(c) of the Indian Partnership Act 1932, should not be relied on as strong persuasive authorities when our Courts construe the above-quoted s. 35(1) of our Act which, it will be seen, is not exactly similar.

(b) Section 35(1) of our Act is in *pari materia* with s. 33(1) of the UK Partnership Act 1890, and English decisions on the latter provision would therefore be more useful and persuasive in this respect.

[3] (a) The Court in construing s. 35(1) of our Act need not look further than the said originating summons itself dated 1 October 1988, and the affidavits filed in support thereof, which show clearly that there was no agreement between the partners of the partnership existing prior to 25 August 1988 or 29 April 1988, that the partnership should not be dissolved as regards all the partners by the death of either one of the two partners concerned.

(b) The learned Judge was therefore correct in finding that having regard to the circumstances prevailing in 1988, there was no evidence either written or oral or to be inferred from the conduct of the surviving partners and the heirs of the deceased partners to justify a conclusion that there was an agreement between the existing partners that the partnership should continue notwithstanding the death of a partner.

[Appeal dismissed.]

Cases referred to:
Inland Revenue v. Graham's Trustees [1971] Scots Law Times 46
In re Adams & Anor. [1853] 2 Ky Bk 3
Lancaster v. Allsup [1887] 57 Law Times 53

Legislation referred to:
Contract Act [Ind], s. 253(10)
Contracts (Malay States) Ordinance 1950, s. 206(j)
Partnership Act 1961, s. 35(1)
Partnership Act 1932 [Ind], s. 42(c)
Partnership Act 1890 [UK], ss. 33(1), 33
Registration of Businesses Act 1956, s. 5
Registration of Businesses Rules 1957, r. 6(3)

For the appellants - G. Sri Ram (Joseph Yeo with him); M/s. Sri Ram & Co.
For the respondents - C.V. Das (Krishna Aiyar with him); M/s. Majid, Krishna, Menon & Lee

JUDGMENT

Gunn Chit Tuan SCJ:

This appeal involves the construction of s. 35(1) of the Partnership Act 1961 (our Act), which is concerned with the dissolution of a partnership by death or bankruptcy and is as follows:

> 35(1) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

On 1 October 1988, Lee Choo Yam Holdings Sdn. Bhd., Hew Hee @ Hew Tin Hee and Cheh Yah Chok (the respondents) filed an originating summons for an order for a declaration that the partnership and business of Tai Kwong Goldsmiths & Jewellers stand dissolved under s. 35(1) of the Partnership Act 1961, and that a receiver be appointed for the purposes of a dissolution of the said business. The originating summons was served on Khoo Yoke Wah, Lee Kim Seng, Lee Choo Keong, Lee Choo Leong, Lee Wah Hoong, Lee Bon Chai @ Lee Kim Hooi (the appellants) and on one Eng Chek Song @ Eng Hup Choon who did not oppose it.

The relevant facts found by Annuar J in the High Court were that the appellants, the respondents and the said Eng Chek Song as partners of Tai Kwong Goldsmiths & Jewellers were carrying on the business of goldsmiths and jewellers. One Lee Choo Meng, who was the most senior partner managing the business died in August 1988 whilst another partner, Ngai Ngan Tong, died in April 1988.

When the partnership was formed on or about 15 September 1958, there were 18 partners. Since the formation of the partnership until the death of the said Lee Choo Meng in 1988, there were several changes in the constitution of the partnership firm. Some partners died while others joined as new partners or merely stepped into the shoes of a deceased partner. Nobody suggested that any of those changes dissolved the original partnership and it is also not disputed that when one Lee Toh Seng who joined the partnership in 1973 died on 9 April 1982, his legal administratrix and administrator were taken in as partners. But when the said Lee Choo Meng died testate on 25 August 1988 and his widow wanted to step into his shoes in the partnership, that was opposed by the respondents who then contended that the death had dissolved the partnership.

Mr. Sri Ram, the leading Counsel for the appellants, stated that they accept the proposition that by reason of the terms of s. 35(1) of the Partnership Act 1961, the death of a partner, in the absence of an agreement to the contrary, dissolves a partnership. It was common ground between the parties in the Court below that the agreement envisaged by s. 35(1) need not be in writing but may be evinced from the conduct of the parties and all the circumstances of the case. But the learned Judge held that there must be cogent proof of an agreement made between the parties at the time they first entered into the partnership and should have been made prior to the death of the partner. For the appellants, it was submitted that the learned Judge was wrong in law in concluding as he did. It was submitted that the true principle is that a contrary intention, namely that death does not dissolve a partnership, may be deduced from the conduct of the surviving partners and the heirs of the deceased partner.

Counsel also referred to a letter dated 12 May 1982, written by a firm of solicitors to the manager of the Development and Commercial Bank Berhad (p. 138 of the appeal records) to inform him that three partners of the partnership had withdrawn from it with effect from 30 April 1982. There was never then any suggestion that the withdrawal of those partners had brought the old partnership to an end. Mr. Sri Ram also submitted that in this respect, our common law is the same as the Indian common law. And until the Partnership Act 1961, came into force on 1 July 1974, the law of partnership in Peninsular Malaysia in this regard was governed by the repealed s. 206(j) of the Contracts (Malay States) Ordinance 1950, which was *ipsissima verba* with s. 253(10) of the Indian Contract Act 1872. The partnership provisions in the Indian Contract Act 1872, were repealed and replaced by the Indian Partnership Act 1932 and, according to Counsel, s. 42(c) of that latter Act is the equipollent of our present s. 35(1). He therefore submitted that Indian cases decided on this subject are relevant and applicable and referred us to five Indian authorities. He then submitted that upon consideration of the totality of the facts and circumstances of the case, the only conclusion that may fairly be arrived at is that there was a contract to the contrary as envisaged by s. 35(1). In support of that proposition, he referred to a copy of a form filed with the Registrar of Businesses in 1982 (p. 137 of the appeal records) and pointed out that there was nothing in that form to declare the dissolution of the partnership when the first death occurred in the partnership when the said Lee Toh Seng died on 9 April 1982. Also when another partner of the firm, one Lee Sin, died in October 1984, his son Lee Kim Seng stepped into the partnership in place of his father (pp. 168 and 169 of the appeal records).

Counsel then referred to s. 5 of the Registration of Businesses Act 1956, concerning the registration of businesses as well as to the proviso to r. 6(3) of the Registration of Businesses Rules 1957, which makes it obligatory for a form B to be filed stating that an original partnership has been dissolved and a new partnership formed. He stated that an examination

of the relevant forms filed in this case discloses no such statement (pp. 162 to 186 of the appeal records) and contended that if there had been such a dissolution as alleged, it was reasonable that such fact would have been stated in the relevant forms.

It was the contention of Counsel that there was no judicial appreciation of the relevant facts and circumstances including the foregoing matters. Instead the learned Judge had held (at pp. 25 to 27 of the appeal records) that each death dissolved the partnership and thereafter a new partnership commenced. Counsel submitted that such a conclusion was not warranted by the evidence when viewed in the proper perspective. As the findings made by the learned Judge are not based on the credibility of witnesses seen and heard by him but are based on depositions by way of affidavits, Counsel stated that on well established principles the appellate Court in such a case was therefore in as good a position as the trial Court to come to its own conclusions.

Mr. C.V. Das, leading Counsel for the respondents, stated that there were two matters before the learned Judge, namely, what was the proper construction of s. 35 of the Act and what was the evidence adduced for his consideration. He stated that our Act is similar to the United Kingdom Partnership Act and that the important words are "as regards all the partners", which do not appear in the Indian Partnership Act. Counsel then referred to the judgment of the learned Judge and submitted that his Lordship's interpretation of s. 35 of the Act was correct and that the words "agreement between the partners" were also important. He then referred to *Lancaster v. Allsup* [1887] 57 Law Times 53, in which case it was held by Stirling J in the Chancery Division that the Court would not, on the death of a partner force the executors to become partners against their will; and, if they declined to come in, the partnership must be treated as dissolved as from the death of the deceased partner, and wound up on that footing. Counsel also referred to the House of Lords case of *Inland Revenue v. Graham's Trustees* [1971] Scots Law Times 46, in which it was held that under s. 33 of the UK Partnership Act 1890, which is similar to s. 35 of our Act, the partnership had been dissolved by the death of the deceased and that the partnership carried on by the survivors was a different and distinct legal *persona*. Mr. Das then stated that there was a partnership split in this case in 1986 and in 1988 after the death of two partners, the surviving partners refused to sign a form B for filing with the Registrar of Businesses. He contended that the learned Judge was right to hold the view that the representatives of a deceased partner were only eligible to join in a new partnership if accepted by the surviving partners.

Counsel then referred to an affidavit dated 14 January 1989, (pp. 72 - 73 of the appeal records) affirmed by the said Eng Chek Song @ Eng Hup Choon, who is the only surviving original partner, in which he has refuted the allegations of the appellants in the affidavits affirmed by the second appellant Lee Kim Seng and filed by him on behalf of all the appellants. Counsel also pointed out that the said Lee Kim Seng only came into the partnership in 1985 but has affirmed those affidavits claiming that all the matters deposed to by him in the affidavits were within his personal knowledge.

We have examined both the repealed s. 206(j) of our Contracts (Malay States) Ordinance 1950, and the repealed s. 253(10) of the Indian Contract Act 1872, and agree that they were similarly worded. That being so, we would agree that Indian cases concerning the construction of the repealed s. 253(10) of the Indian Contract Act 1872, would have been useful and persuasive authorities for construing the repealed s. 206(j) of the Contracts (Malay States) Ordinance 1950, prior to 1 July 1974. But since the coming into force of our Partnership Act 1961, for the whole of Malaysia on that date, Indian cases on the construction of the

repealed s. 253(10) of the Indian Contract Act 1872, or the following s. 42(c) of the Indian Partnership Act 1932, should not be relied on as strong persuasive authorities when our Courts construe the above-quoted s. 35(1) of our Act which, it will be seen, is not exactly similar:

> 42. Subject to contract between the partners a firm is dissolved:
>
> (c) by the death of a partner;

Section 35(1) of our Act is in *pari materia* with s. 33(1) of the UK Partnership Act 1890, and English decisions on the latter provision would therefore be more useful and persuasive in this respect. But we have not been referred to nor have we been able to find any English decision in which the issue in this case has been litigated. It is interesting to note that more than a hundred years ago, the Supreme Court of the former Straits Settlements had held that the death of a partner operates as a dissolution not only as regards the deceased but also as between the surviving partners. (See *In re Adams & Anor*. [1853] 2 Ky. Bk. 3). However, as the appellants have correctly accepted that by reason of the terms of s. 35(1) of our Act, the death of a partner, in the absence of any agreement between the partners, dissolves a partnership, the only issue in this case was whether there was evidence of any agreement that the partnership was not dissolved by the deaths of the said Lee Choo Meng on 25 August 1988, and of the said Ngai Ngan Tong on 29 April 1988. We would point out that in this case we were not concerned with what happened to the partnership of Tai Kwong Goldsmiths and Jewellers each time there was a death of a partner since 9 April 1982, and it was not really necessary for the learned Judge to have held, albeit correctly, that each death dissolved the partnership and thereafter a new partnership commenced. The only issue in this case for the Court's consideration was whether there was evidence of any agreement between the existing partners that the partnership would not be dissolved by the death of the said Lee Choo Meng on 25 August 1988, or the death of the said Ngai Ngan Tong on 29 April 1988. In this regard, we consider that the Court in construing s. 35(1) of our Act need not look further than the said originating summons itself dated 1 October 1988, and the affidavits filed in support thereof, which show clearly that there was no agreement between the partners of the partnership existing prior to 25 August 1988 or 29 April 1988, that the partnership should not be dissolved as regards all the partners by the death of either one of the two partners concerned. The learned Judge was therefore correct in finding that having regard to the circumstances prevailing in 1988, there was no evidence either written or oral or to be inferred from the conduct of the surviving partners and the heirs of the deceased partners to justify a conclusion that there was an agreement between the existing partners that the partnership should continue notwithstanding the death of a partner. The order of the High Court declaring on 6 March 1990, that the partnership firm of Tai Kwong Goldsmiths and Jewellers do stand dissolved is confirmed and we would therefore dismiss this appeal with costs.

Also found at [1991] 1 CLJ 663